No. 77-1360

In the Supreme Court of the United States

OCTOBER TERM, 1977

BOYER ALFREDO BRACY AND SANDRA DENISE MARTIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
JOHN F. DEPUE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 57a-77a) is reported at 566 F. 2d 649.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1977. A petition for rehearing and suggestion for rehearing *en banc* was denied on February 28, 1978 (Pet. App. 78a-79a). The petition for a writ of certiorari was filed on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge erred in failing *sua sponte* to declare a mistrial in order to dismiss the indictment when he learned that a government witness committed perjury before the grand jury.

2. Whether the evidence established multiple conspiracies rather than a single conspiracy.

3. Whether evidence seized from a co-conspirator's suitcase and incidental to petitioner Bracy's arrest was inadmissible.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of conspiring to import heroin and cocaine and importing heroin, in violation of 21 U.S.C. 952, 960, and 963; conspiring to possess heroin and cocaine with intent to distribute and possessing the heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 846. Petitioner Bracy (hereafter A. Bracy) was sentenced to 15 years' imprisonment, to be followed by a 20-year special parole term, and fined $25,000. Petitioner Martin was sentenced to three years' imprisonment, to be followed by a special parole term of five years. The court of appeals affirmed (Pet. App. 57a-77a).[1]

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[1]Four other persons were indicted, and tried on all counts. Juanita Louise Kendricks, petitioner A. Bracy's mother, and Brenda Bracy, petitioner A. Bracy's sister, were tried jointly with petitioners. Kendricks was acquitted. Brenda Bracy was convicted on all counts and sentenced to five years' imprisonment followed by a five-year special parole term. The court of appeals affirmed. *Ibid.* Stephanie Marie Gurley (hereafter Gurley) and Jerry Word (hereafter Word) were also convicted of the conspiracy and substantive counts following separate trials. Gurley was sentenced to seven years' imprisonment to be followed by a ten-year special parole term; Word was sentenced to ten years' imprisonment to be followed by a ten-year special parole term. The court of appeals also affirmed these convictions. *United States* v. *Gurley*, 549 F. 2d 809 (C.A. 9); *United States* v. *Word*, C.A. 9, No. 76-3487, decided March 31, 1977, certiorari denied, 431 U.S. 942.

Briefly, the government's evidence demonstrated the existence of a continuing enterprise to smuggle heroin and other illicit drugs across the Mexican border and transport them to the Detroit, Michigan area. As the court of appeals observed, petitioner A. Bracy "was the catalyst around whom the overall web of conspiracy was spun" (Pet. App. 63a). Petitioner Martin, as well as co-defendants Brenda Bracy, Gurley, Word, and several other co-conspirators, were active participants in the scheme. The nature and scope of the conspiracy was established through evidence which showed the conspirators' involvement in a series of related incidents whose objective was the procurement, importation, and transmission of heroin and cocaine.

1. On February 16, 1975, petitioner A. Bracy and Margaret Canada approached a baggage-security check point at the Detroit Metropolitan Airport. An airline security guard placed Canada's suitcase onto a conveyor belt that led to an X-ray machine. Thereafter a second security guard indicated that she would have to open it for further visual inspection. A. Bracy asked "why," and the guard explained that she couldn't identify an object inside. After waiting approximately five seconds without hearing any objection from either A. Bracy or Canada, the guard opened the suitcase and observed a large amount of cash (I Tr. 81-91, 117, 133; Pet. App. 36a).[2]

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[2]The abbrevation "Tr." refers to the trial transcript and the abbreviation "M. Tr." refers to the motion transcript. The volume number precedes the abbreviation, and the page number follows it.

Canada then boarded a plane bound for San Diego, California, with the suitcase. The guard reported her discovery to a local Drug Enforcement Administration (DEA) agent, who ran a routine check on petitioner A. Bracy and found that he had a long history of narcotics violations (II M. Tr. 33).

After authorities in San Diego were notified, they established surveillance on Canada. Canada was met at the airport by Clarence Turner and Anne Welsh,[3] and the trio rented a room in San Diego. On the following morning Turner and Welsh placed an empty duffel bag in an automobile rented by Welsh and drove to Tijuana, Mexico. When they returned, objects were clearly discernible at the bottom of the duffel bag. Shortly after their return to the motel, the duffel bag and the suitcase in which Canada had transported the money from Detroit were hurriedly placed in the trunk of the car. Canada, Turner, and Welsh then drove north at a high rate of speed. The automobile was stopped by surveilling agents who asked Welsh whether she would object to a search of the vehicle and its contents for contraband. She replied, "No, I don't." During the ensuing search the officers found four pounds of heroin and one pound of cocaine in the suitcase (II M. Tr. 135-165).

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[3]Canada, Turner, and Welsh were named in the indictment as previously indicted co-conspirators (Pet. App. 10a). All three were convicted of conspiracy to possess heroin and cocaine and of possessing heroin and cocaine with intent to distribute them in violation of 21 U.S.C. 841(a)(1), 846. Canada was sentenced to five years' imprisonment to be followed by a 15-year special parole term. The court of appeals affirmed. *United States* v. *Canada*, 527 F. 2d 1374 (C.A. 9), certiorari denied, 429 U.S. 867. Welsh was sentenced to three years' imprisonment and Turner to five years' imprisonment, both sentences to be followed by ten-year terms of special parole. The court of appeals also affirmed these convictions. *United States* v. *Welsh*, C.A. 9, Nos. 75-3000 and 75-3001, decided May 25, 1976.

2. Shortly before Christmas, 1975, James Howard Porter, an unindicted co-conspirator (Pet. App. 9a) who had been employed by petitioner A. Bracy, and one Lomas, who had been a construction supervisor at A. Bracy's home, established a residence in Los Angeles, California. Early in 1976, A. Bracy visited their apartment and gave Porter and Lomas money to buy undergarments to conceal narcotics. When Lomas and Porter obtained the clothing, all three went to San Diego, where Porter rented a motel room. While Lomas remained in the room, A. Bracy and Porter went to Tijuana (VI Tr. 915-919). There they met Manuel Banagas (Manning) who was given a briefcase by petitioner Bracy. Porter was instructed to remain at the Tijuana Ramada Inn and give a set of car keys to Manning upon his arrival (III Tr. 454-458).

Afterwards, Porter returned to San Diego, where he telephoned Lomas and was advised that Lomas, Brenda Bracy, and her children would be traveling to San Diego. Lomas instructed Porter to wait for Brenda Bracy in Tijuana. Upon her arrival in Mexico, Brenda Bracy called Manning, who came to her hotel room with the car keys previously given him by Porter. Brenda Bracy then left the room and returned with several bags of heroin and cocaine mixed in two bags of baby clothing. Brenda Bracy and Porter agreed that she would smuggle the heroin across the border and he would cross with the cocaine (III Tr. 459-464).

Brenda Bracy, Porter, and Lomas subsequently met in Los Angeles and agreed that Porter should transport the narcotics to A. Bracy's home near Detroit. Porter departed that night for Detroit but, upon arrival, became suspicious that he would not be paid for his assistance in the venture. He left the heroin and flew back to Los Angeles keeping the cocaine as security. After he returned

to Los Angeles, Porter was questioned by petitioner Martin, Brenda Bracy, and Canada as to his reasons for retaining the cocaine, and they tried to convince him to surrender it (III Tr. 466-478; Pet. App. 61a). He did so only after being paid by petitioner A. Bracy (III Tr. 480; Pet. App. 61a).

4. In mid-March, 1976, Porter was contacted by petitioner Martin and informed that A. Bracy was coming to Los Angeles and wanted Porter to "do something for him." Both petitioners and Word met with Porter at his apartment to organize the continuation of the smuggling effort (III Tr. 485-488; Pet. App. 61a). After Porter was given money by A. Bracy to purchase a girdle for smuggling purposes, Porter left for Tijuana, Mexico, where he checked in at the Ramada Inn. Both petitioners and Word subsequently arrived at the hotel restaurant, and Porter gave his room number to them. Two hours later petitioners and Word arrived at Porter's room bringing two kilos of heroin. Porter was assigned to smuggle the heroin across the border in his girdle and tried various means of concealing the heroin on his person while both petitioners commented upon whether it could be observed under his clothing. Porter then flew back to Los Angeles and returned to his apratment. A. Bracy arrived at Porter's apartment, took the heroin, and paid Porter $1,000 for his efforts (III Tr. 490-498; Pet. App. 62a).

On March 20, 1976, A. Bracy again instructed Porter to go to the Ramada Inn in Tijuana. Porter did so, but when A. Bracy failed to arrive, he returned to Los Angeles (IV Tr. 505-507; Pet. App. 62a). The same day Word, accompanied by A. Bracy, borrowed a car from one Debra Gillenwater. Thereafter, Word and petitioner Martin registered in separate rooms at the Tijuana Ramada Inn (VI Tr. 796; IX Tr. 1305-1310). The next morning Martin

called Porter, and A. Bracy inquired as to why Porter was not in Tijuana. He instructed Porter to return there immediately. Several hours later Martin again called Porter to inquire why he had not left for Mexico. Porter went to the airport but missed his flight and phoned A. Bracy to inform him of this. A. Bracy then told Porter to forget about coming to Tijuana (IV Tr. 505-511; Pet. App. 62a-63a). On that same day, the automobile borrowed by Word from Debra Gillenwater was driven by Gurley across the San Ysidro port of entry. Inspection of the vehicle at the border revealed the presence of narcotics (II Tr. 197-225; Pet. App. 63a).

ARGUMENT

1. Petitioners contend (Pet. 8-13) that the trial judge erred in failing to declare a mistrial *sua sponte* and dismiss the indictment when the fact that perjured testimony had been presented to the grand jury became apparent during trial.

The relevant facts are that James Howard Porter was served with a grand jury subpoena on April 6, 1976 (IV Tr. 512), and, within a week, he phoned A. Bracy demanding $25,000 for his silence (IV Tr. 526). Although protesting innocence, A. Bracy referred him to Detroit. Later, another witness received an envelope from Bracy which apparently contained money to pay Porter's legal fees (Pet. App. 63a).

On April 14, 1976, Porter appeared before the grand jury and falsely testified that he had stopped working for A. Bracy in November 1975, had only seen him once since then, and that A. Bracy had suggested that he engage in drug smuggling and he had refused to do so. Approximately ten days later Porter informed DEA agents that he had perjured himself before the grand jury (Pet. App. 63a). On April 28, 1976, when DEA Agent Lunsford

testified before the grand jury, he specifically informed it that Porter admitted to him that he had been involved in the smuggling operation and delineated the scope of Porter's involvement in it (Ct. Exh. B). Porter did not reappear before the grand jury, and neither the court nor opposing counsel was immediately informed of the perjury. By May 26, 1976, however, petitioners had received the investigating officer's reports containing Porter's admission to Lunsford that he had lied to the grand jury, and, the day before the trial began (August 10, 1976), the grand jury testimony of Porter, Lunsford, and others was made available to petitioners (Pet. App. 64a).

At trial Porter admitted that he perjured himself before the grand jury (*e.g.*, IV Tr. 543). At that point petitioners moved to dismiss the indictment due to the government's failure specifically to notify the grand jury, the court, and defense counsel of the perjury. The motion was denied, although the trial judge offered to entertain a mistrial motion which would not preserve petitioner's double jeopardy defense. Petitioners refused to waive any double jeopardy defense by moving for a mistrial, and the trial court refused to follow petitioners' suggestion that he grant a mistrial *sua sponte* (VI Tr. 779-784; Pet. App. 45a-52a).

It is clear that the trial judge did not err in refusing to declare a mistrial or dismiss the indictment. As Mr. Justice Rehnquist explained in denying petitioners' motion for a stay in this case:

> [I]t seems to me that applicants misconceive the function of the grand jury in our system of criminal justice * * *. The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require

> him to stand his trial. Because of this limited function, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay. *Costello* v. *United States*, 350 U.S. 359 (1956), or by the introduction of evidence obtained in violation of the Fourth Amendment. *United States* v. *Calandra*, 414 U.S. 338 (1974). While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of that factfinding process, its introduction before the grand jury poses no such threat. I have no reason to believe this Court will not continue to abide by the language of Mr. Justice Black in *Costello*, *supra*, at 363: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." The Fifth Amendment requires nothing more. [*Bracy* v. *United States*, No. A-798 (77-1360), March 29, 1978.]

See also *United States* v. *Guillette*, 547 F. 2d 743, 755 (C.A. 2), certiorari denied, No. 76-6615 (October 3, 1977); *United States* v. *Rundle*, 383 F. 2d 421, 423 (C.A. 3), certiorari denied *sub nom. Almeida* v. *Rundle*, 393 U.S. 863. Here petitioners claim neither that the indictment was facially invalid nor that the grand jury was illegally constituted.

United States v. *Basurto*, 497 F. 2d 781 (C.A. 9), upon which petitioners rely, is not to the contrary. The court of appeals construed its opinion in *Basurto* to require dismissal of the indictment for failure to disclose perjury only where the perjured testimony is material (Pet. App. 67a). See also *United States* v. *Bowers*, 534 F. 2d 186, 193 (C.A. 9), certiorari denied, 429 U.S. 942. Here the court of appeals correctly found that Porter's testimony was immaterial to the return of the indictment (Pet. App. 65a-67a) because it did not affect petitioners' culpability and,

moreover, it was obvious that the grand jury, which was also presented Lunsford's testimony that Porter had admitted participation in the scheme, disbelieved Porter's claim of ignorance (Pet. App. 66a, 69a).[4]

In sum, as the court of appeals noted, "defense counsel were aware or should have been aware of the alleged perjury before trial * * *,"[5] the perjury was immaterial to the indictment, and the defense exhaustively explored the question of perjury during its cross-examination of Porter at trial (Pet. App. 71a). Petitioners therefore have no basis for alleging that the prosecution's failure to inform them specifically that Porter had committed perjury before the grand jury could in any way have affected their defense and warranted declaration of a mistrial, particularly barring reprosecution of the charges.

2. Petitioners also claim (Pet. 12-19) that they were prejudiced by improper joinder because the evidence failed to show their participation in the February 1975 transaction resulting in the seizure of heroin and cocaine from Margaret Canada and the March 20, 1976 incident involving the seizure of heroin in an automobile driven by

[4]Petitioners dispute the court's application of *United States* v. *Agurs*, 427 U.S. 97, to the context of grand jury perjury (Pet. 26-27). However, petitioners' argument fails to recognize that the court relied upon *Agurs* only in addressing the narrow question of the prosecutor's duty of disclosing perjury to the defense. The *Agurs* decision was not the basis for the court's broader conclusion that the grand jury need be informed of perjury only when the perjured testimony is material.

[5]Indeed, since petitioners were aware of the perjury before trial their failure to move for dismissal at that time foreclosed any right to move for dismissal of the indictment after jeopardy attached. Rule 12(b)(2), Fed. R. Crim. P.

Stephanie Gurley. The court of appeals carefully reviewed the evidence in respect to these claims (Pet. App. 73a-75a) and noted that this case is controlled by the principle that a single conspiracy can be demonstrated by evidence showing "[e]ach one of the defendants knew or should have known that other retailers were involved and that each had reason to believe that what benefits he received were probably dependent upon the success of the entire venture" (*id.* at 73a-74a). See also *Blumenthal* v. *United States*, 332 U.S. 539, 557. Accordingly, for the reasons stated in the opinion of the court of appeals, on which we rely, the evidence linking petitioners to these transactions (Pet. App. 73a-75a) was sufficient to establish one overall conspiracy.[6]

Petitioners' additional contention (Pet. 17, 18-19) that the trial judge erred by failing to instruct the jury that it could find the existence of multiple conspiracies is unfounded. The trial transcript reveals that the trial judge instructed the jury as follows:

> Although the indictment in this case charged a single conspiracy, it would be possible to find separate conspiracies, one relating to the Margaret

[6]Petitioners also suggest (Pet. 28-29) that the court of appeals improperly predicated the affirmance of their conspiracy convictions on familial relationships and personal friendships. We agree that a conspiracy conviction cannot rest exclusively upon evidence of association with known participants, *e.g.*, *United States* v. *James*, 528 F. 2d 999, 1014 (C.A. 5), certiorari denied *sub nom. Henry* v. *United States*, 429 U.S. 959. Here, however, the decision of the court of appeals is clearly based upon a review of independent evidence demonstrating the petitioners' efforts in furtherance of the smuggling scheme and not simply upon associations (Pet. App. 74a). The court relied on petitioners' relationships with other participants only to demonstrate their familiarity with them and reinforce otherwise fully sufficient evidence that each participant was familiar with the overall scope of the scheme (Pet. App. 74a-75a). See *United States* v. *Baldarrama*, 566 F. 2d 560, 566 (C.A. 5).

Canada incident in February of 1975 and the other relating to the Stephanie Maria Gurley incident in March 1976.

Whether there was one conspiracy or two conspiracies or no conspiracy at all is a fact for you to determine in accordance with instructions. [XI Tr. 1680.]

Moreover, as the court of appeals recognized (Pet. App. 75a), the trial judge fully protected petitioners from the possibility of being convicted as participants in a conspiracy with which they were not actually connected by instructing further that the jury was not to consider any act "against any defendant unless you find beyond reasonable doubt that the person doing the act, making the declaration, *was a member of the same conspiracy as was the defendant*" (emphasis added) (XI Tr. 1680-1681; Pet. App. 75a). See *Kotteakos* v. *United States*, 328 U.S. 750, 770-771.

3. Petitioners also argue that the narcotics seized during the search of Canada's suitcase was inadmissible due to the illegality of that search and of the aircraft boarding search which preceded it (Pet. 14-15, 16, 23-25) and that evidence seized pursuant to petitioner A. Bracy's arrest was inadmissible because improper procedures were followed in procuring his arrest warrant (Pet. 20).

a. Petitioners lack standing to assert the invalidity of the search of Canada's suitcase, since neither petitioner has ever claimed or sought to establish a proprietary interest in the suitcase where the substances were discovered[7] or in the leased automobile. Moreover, they

[7]During the suppression hearing A. Bracy testified that the green suitcase belonged to Canada and that he was unaware of its contents and did not assist her in carrying it until after it left the conveyor belt and the security officer had inspected it (III M. Tr. 259-267). Accordingly, petitioner failed to establish standing to challenge

were not charged with possession of these narcotics, which were introduced into evidence for the limited purpose of establishing several of the overt acts alleged in connection with the conspiracy offenses. See *Brown* v. *United States*, 411 U.S. 223; *United States* v. *Guerrera*, 554 F. 2d 987, 989-990 (C.A. 9).

In any event, these claims, which were rejected by the court of appeals in *United States* v. *Canada*, 527 F. 2d 1374 (C.A. 9), certiorari denied, 429 U.S. 867, are without merit. As the court found in *Canada*, the airport security search was consensual since " 'the alternatives presented to a potential passenger appraoching the screening area are so self-evident that his election to attempt to board necessarily manifests acquiescence in the initiation of the screening process' " (527 F. 2d at 1378, quoting *United States* v. *Davis*, 482 F. 2d 893, 914 (C.A. 9)). In short, consent was implicit from the totality of the circumstances. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227; *United States* v. *Miner*, 484 F. 2d 1075, 1076 (C.A. 9); *United States* v. *Davis*, *supra*, 482 F. 2d at 914.[8]

the legality of the pre-flight search. See *United States* v. *Prueitt*, 540 F. 2d 995, 1005 (C.A. 9), certiorari denied *sub nom. Petersen* v. *United States*, 429 U.S. 1063. Contrary to petitioners' claim (Pet. 16 n. 4), the trial judge did not specifically resolve the standing issue, but assumed the existence of standing in order to address the merits of the legality of the airport search (see IV M. Tr. 19-20, 48, 65).

[8]Petitioners' contention (Pet. 22-24) that the court of appeals' decision in *United States* v. *Canada*, *supra*, conflicts with its earlier decision in *United States* v. *Davis*, *supra*, is erroneous. In *Davis* the court specifically found that pre-flight screening procedures and the options available to potential passengers were not yet widely known. Moreover, the record in *Davis* disclosed that the briefcase that was subject to the search was taken from the defendant's hand and opened before the defendant had the opportunity to do or think

Petitioner's challenge to the legality of the automobile search is also insubstantial. It is readily apparent, and, indeed, petitioners do not dispute, that after surveilling the occupants for almost two days, the investigating officers had probable cause to believe they were transporting narcotics. *United States* v. *Canada, supra,* 527 F. 2d at 1377, 1379-1380. Moreover, as the automobile was fleeing from the scene of the drug purchase transaction at a high rate of speed it was proper to seize and search the vehicle and its contents without a warrant. *Chambers* v. *Maroney,* 399 U.S. 42, 52; see *Texas* v. *White,* 423 U.S. 67, 68; *United States* v. *Tuley,* 546 F. 2d 1264, 1268 (C.A. 5), certiorari denied, No. 76-6380 (October 3, 1977).

b. Petitioners' final claim, that coded slips of paper found on A. Bracy's person during a search incident to his arrest were inadmissible because his arrest was illegal, is likewise without merit (Pet. 19-21).[9] Petitioners assert that when the arrest warrant was issued on April 15, 1976, the complaint supporting the warrant had not yet been prepared and sworn, since the date of the magistrate's attestation, which is not clearly legible, can be read as April 16, 1976. This claim is without substance. The date stamp on the complaint, as well as the minutes of the United States District Court for the Southern District of California (Pet. App. 21a; Record on Appeal 1, 2), show that both the complaint and DEA Agent Lunsford's

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anything. 482 F. 2d at 896 n. 1, 914. It consequently declined to find that the defendant implicitly consented to the pre-flight search. These factors clearly were not present when Canada's luggage was searched.

[9]Of course, petitioner Martin lacks standing to assert the illegality of A. Bracy's arrest and the ensuing search of his person. *E.g., Brown* v. *United States, supra.*

affidavit were filed with the court on April 15, 1976, and that the affidavit was ordered sealed on that date. Resolving the ambiguity resulting from the magistrate's illegible handwriting in the government's favor, it must be concluded that the warrant was supported by a properly executed complaint.

Moreover, even if it were assumed that the complaint was not sworn until April 16, 1976, petitioner's claim is insubstantial. As petitioners concede (Pet. 20), Rule 4(a) of the Federal Rules of Criminal Procedure provides that "[i]f it appears from the complaint, *or from an affidavit or affidavits filed with the complaint,* that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it" (emphasis added). Indeed, "[t]here is no reason * * * why an arrest warrant should * * * be predicated on a complaint rather than simply an affidavit as in the case of a search warrant." *United States* v. *Duvall,* 537 F. 2d 15, 22 (C.A. 2). Here, the DEA investigator's affidavit of April 15, 1976, itself fully established a sufficient factual basis to support issuance of the warrant.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
JOHN F. DEPUE,
Attorneys.

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